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Unauthorized Practice of Law: Attorney v. Real Estate Broker

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UNAUTHORIZED PRACTICE OF LAW: ATTORNEY V. REAL ESTATE BROKER

There exists between real estate brokers and attorneys a continuing conflict concerning the extent to which brokers may prepare the documents necessary to close transactions. Though the subject has stimulated less litigation in California than in other states the conflict is of greater importance here due to the enormous number of daily real estate transactions. This comment will provide a brief background to the conflict and then show that real estate brokers do, in fact, have many of the powers attorneys so often accuse them of usurping. In closing, a new and possibly more effective technique for curbing the practice of law by real estate brokers will be proposed.

During the latter half of the 1950's many state bar associations, aided by the American Bar Association, attempted to clarify their state's laws regarding the power of real estate brokers to practice a limited amount of law.[1] The decision of the Arkansas Supreme Court in *Arkansas Bar Ass'n v. Block*[2] best presents the position taken by the state bar associations and the American Bar Association. In that suit, brought by the Arkansas Bar Association against a real estate broker for the unauthorized practice of law, the court found for the Bar and enjoined real estate brokers from filling in some 21 separate forms even though the forms were standardized, approved by attorneys, and used only incidentally to a transaction in which the defendant was a broker.[3] The court said: "We hold that the preparation of any of the instruments here included, or any other instruments involving real property rights for others either with or without pay . . . constitutes the practice of law."[4] Of the remaining states only two are in accord, Florida and Virginia.[5]

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[1] *E.g.*, Arkansas Bar Ass'n v. Block, — Ark. —, 323 S.W.2d 912 (1959), *cert. denied*, 361 U.S. 836 (1959); Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957); Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855 (1952); State v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (1961); Lohse v. Hoffman, 90 Ariz. 76, 366 P.2d 1 (1961); Ingham County Bar Ass'n v. Neller Co., 342 Mich. 214, 69 N.W.2d 713 (1955).

[2] — Ark. —, 323 S.W.2d 912 (1959), *cert. denied*, 361 U.S. 836 (1959).

[3] The forms were: warranty deeds, disclaimer deeds, quitclaim deeds, joint tenancy deeds, options, easements, loan applications, promissory notes, real estate mortgages, deeds of trust, assignments of leases or rentals, contracts of sale of real estate, releases and satisfactions of real estate mortgages, agreements for the sale of real estate, bills of sale, contracts of sale, mortgages, pledges of personal property, notices and declarations of forfeiture, notices requiring strict compliance, releases and discharges of mechanic's and materialmen's liens.

[4] — Ark. —, —, 323 S.W.2d 912, 916 (1959).

[5] Comment, *Unauthorized Practice of Law by Real Estate Brokers and Title Insurance Companies*, 36 NOTRE DAME LAW. 374, 387 (1961).

In 1962 the Arizona Supreme Court, in the consolidated cases of *Lohse v. Hoffman* and *State Bar of Arizona v. Arizona Land Title and Trust Co.*,[6] aligned itself with the *Arkansas* decision but was reversed by an amendment to the Arizona Constitution.[7] The amendment initiative, originated by the Arizona Real Estate Association, passed by a four to one margin.[8] In California legal opinion seems to be in accord with that of other state bar associations and the American Bar Association, though the problem has given rise to less overt action.

As in most states prior to the unauthorized practice campaign of the 1950's, the law of California, particularly case law, is vague on the point decided in the Arkansas and Arizona cases. Lack of prosecution of real estate brokers for the unauthorized practice of law indicates the acquiescence of attorneys to the right of real estate brokers to practice a limited amount of law. But this most certainly does not represent approval of that right. The ill feelings preserved by this continuing and real conflict keep apart two professions which must cooperate to insure adequate and fair zoning ordinances, land use restrictions, city planning and, indeed, all facets of land use.

The generally accepted definition of the practice of law includes the following: "[L]egal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court."[9] Given this definition it is obvious that the Arizona amendment gives real estate brokers the right to practice a limited amount of law by allowing them to draft instruments securing legal rights. The same situation exists in California through legislation and interpretation rather than amendment as the following discussion will illustrate.

The California Business and Professions Code, section 10131, broadly defines a real estate broker as one who buys, sells or exchanges real property for a compensation for another. The defini-

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[6] 90 Ariz. 76, 366 P.2d 1 (1961).

[7] ARIZ. CONST. art. 26, § 1 (1962): "Any person holding a valid license as a real estate broker or a real estate salesman regularly issued by the Arizona State Real Estate Department when acting in such capacity as broker or salesman for the parties, or agent for one of the parties to a sale, exchange or trade, or the renting or leasing of property shall have the right to draft or fill out and complete without charge, any and all instruments incident thereto including, but not limited to, preliminary purchase agreements and earnest money receipts, deeds, mortgages, leases, assignments, releases, contracts for sale of realty, and bills of sale."

[8] Riggs, *Unauthorized Practice and the Public Interest: Arizona's Recent Constitutional Amendment*, 37 So. CAL. L. REV. 1, 2 (1964).

[9] People v. Sipper, 61 Cal. App. 2d Supp. 844, 846, 142 P.2d 960, 962 (1943).

tion also includes one who leases or rents real property for another, or one who solicits borrowers or lenders of real property loans, or buyers or sellers of real property sales contracts.[10] However, the terms "buy," "sell," and "exchange" are undefined. Cases interpreting section 10131 hold that a broker's duty is completed when he has produced a buyer who is ready, willing, and able to meet the seller's demands and whose offer has been accepted in writing by the seller.[11] This requirement is usually met by the deposit receipt. To buy, sell, or exchange, then, includes that much. Since the deposit receipt is an enforceable contract between the buyer and seller the code clearly contemplates that a broker be allowed to draft legal instruments securing the rights of his clients.[12] It is but one step further to conclude that he may secure the legal rights of his clients in other ways, too, by drafting deeds, mortgages, trust deeds and so on. This logical step is supported by the proposition that since a real estate broker has the power to buy, sell or exchange property on behalf of his principal he also has the powers necessary to accomplish the sale, purchase or exchange.

Another section of the California Business and Professions Code states that a real estate broker, to be licensed, must display in a written exam "a fair understanding of the rudimentary principles of real estate conveyancing, the general purpose and general legal effect of deeds, mortgages, land contracts of sale and leases . . . [and] a general and fair understanding of the obligations between principal and agent."[13] It seems that a statute which provides for the licensing and regulation of real estate brokers, as the quoted section does, requiring a satisfactory understanding "Of the laws and principles of real estate conveyancing, deeds, mort-

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10 "A real estate broker . . . is a person who for a compensation or in expectation of a compensation, does or negotiates to do one or more of the following acts for another or others:

(a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property.

(b) Leases or rents or offers to lease or rent, or negotiates the sale, purchase or exchange of leases on real property, or collects rents from real property or the improvements thereon.

. . . .

(d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property.

(e) Sells or offers to sell, buys or offers to buy, exchanges or offers to exchange a real property sales contract, or a promissory note secured directly or collaterally by a lien on real property and performs services for the holders thereof."

11 See, *e.g.*, Green v. Linn, 210 Cal. App. 2d 762, 26 Cal. Rptr. 889 (1962).

12 Comment, *California Real Estate Brokers: Conveyancing Forms: The Unauthorized Practice of Law*, 35 So. CAL. L. REV. 336, 351 (1962).

13 CAL. BUS. & PROF. CODE, § 10153.

gages, land contracts for sale and leases indicates that it was not the legislative intent to include as illegal practice of law the acts of real estate brokers in filling in forms for such instruments without extra compensation as an incident to their regular business."[14]

The argument that real estate brokers have the powers necessary to accomplish their duties—to buy, sell, or exchange—is in accord with the agency rule that an agent has the implied power to do those acts necessary to accomplish the purpose of the agency. Many cases interpreting the California Business and Professions Code state that a real estate broker is an agent for his principal.[15] It seems, then, that the code authorizes real estate brokers to act as agents for their clients, and the cases hold that he is to be treated as such unless he has not acted as one. The end result is that a real estate broker may act, at his option, either as an agent or as a middleman who brings buyer and seller together. The broker always has the power of an agent and only when he fails to use it is he less.

The leading case on the subject of unauthorized practice of law by a real estate broker is *People v. Sipper*.[16] In that case a husband and wife entered a real estate broker's office and asked him "to make out a paper to protect Mrs. Hetman for the money" which they had borrowed from her. Though the broker knew nothing of the transaction he drew up a trust deed and later, a mortgage. For this service he charged $15.00, reducing the charge later to $10.00. The appellate court held that the defendant real estate broker had advised the couple as to the type of legal document they should execute in order to secure the loan. His charge indicated that he thought he had performed more than the mere clerical work of typing furnished information on a blank form. These acts constituted the practice of law.

The *Sipper* court stated that if the defendant

> had only been called upon to perform and had only undertaken to perform the clerical service of filling in the blanks on a particular form in accordance with information furnished by the parties, or had merely acted as a scrivener to record the stated agreement of the parties to the transaction, he would not have been guilty of practicing law without a license. [But here] he determined for the parties the kind of legal document they should execute in order to effectuate their purpose. This constituted the practice of law.[17]

Implicit in the holding against the broker are the facts that he

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[14] Annot., 53 A.L.R.2d 777, 778 (1955).
[15] *E.g.*, Meadows v. Clark, 33 Cal. App. 2d 24, 90 P.2d 851 (1939).
[16] 61 Cal. App. 2d Supp. 844, 142 P.2d 960 (1943).
[17] *Id.* at 846-47, 142 P.2d at 962.

charged the parties for the service, and the service was not incidental to a transaction in which he was a broker. The court went on to say: "We are not called upon in this case to pass upon the right of a licensed real estate broker or salesman to make out a deed, mortgage or trust deed as an incident to the completion of a sale or other transaction which he has effected as the representative of one of the parties."[18]

Since the *Sipper* case real estate brokers have indeed made out deeds, mortgages and trust deeds. The most succinct statement of the status of the law today is found in an article written before the *Sipper* case. "An established business custom sanctions the activities of real estate agents in drawing certain agreements in business transactions in which they take part where the instrument is simple or standardized, no fee is charged for the work and the drafting is incidental to his other activities in the transaction."[19] With varying degrees of emphasis upon the criteria of (a) simplicity, (b) no fee being charged, or (c) that the drafting be incidental to another transaction, this rule has been approved in most states.[20]

The preceding discussion of California law and cases has shown how the various provisions of the California Business and Professions Code have been broadly interpreted by real estate brokers and the courts to justify a limited amount of law practice by real estate brokers. However, California does not hold a real estate broker to the attorney's standard of care when the broker engages in activities technically classified as the practice of law. The real estate broker is required to only "exercise the skill to be reasonably expected . . . "[21] of him. He is not held to exercise "such skill, care and diligence as the men of the legal profession commonly possess and exercise in such matters."[22] Moreover, as the law now stands any errors made by the real estate broker in those activities which fall into the classification of the practice of law are probably construed against his clients. A gap exists between the standard of care required of a broker and the activities in which he may participate such that he may negligently prepare a deed, mortgage or trust deed and still be within the standard of care required of him. Two cases will illustrate the consequences of this.

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[18] *Id.* at 848, 142 P.2d at 963.

[19] Comment, *Attorney and Client: What Constitutes the Practice of Law*, 29 CALIF. L. REV. 603, 607 (1941).

[20] Comment, *Unauthorized Practice of Law by Real Estate Brokers and Title Insurance Companies*, 36 NOTRE DAME LAW. 374, 387 (1961).

[21] Colpe Inv. Co. v. Seely & Co., 132 Cal. App. 16, 19, 22 P.2d 34, 35 (1933).

[22] 7 C.J.S. *Attorney and Client*, § 141 (1937).

In *Breeden v. Breeden*[23] the plaintiff held land as a joint tenant with his mother. He brought an action for reformation of the deed against her and their grantors. In completing the contract of sale for the property the real estate broker handling the transaction recommended to plaintiff that he take title to the property he was buying as a joint tenant with his mother. Plaintiff and his mother completed the contract to that effect. A few years after the transaction plaintiff's mother applied for and was granted old age assistance. Her acceptance of such assistance, however, created a lien against the property such that plaintiff was unable to sell it. The court held that all parties to the transaction were aware of the joint tenancy and that the deed contained exactly what all parties had requested. Therefore, there was no mutual mistake requiring reformation. "The fact that parties do not foresee all the legal consequences of their acts does not establish a mutual mistake."[24] Due to the real estate broker's lack of legal knowledge the plaintiff was left with land he could not sell. The court called this "another unfortunate case of persons following the legal advice of another lay person rather than obtaining competent legal advice from an attorney."[25]

In *Engebrecht v. Shelton*[26] the plaintiff brought an action for the reformation of a note and trust deed. The instruments were drawn by a real estate agent employed by the holder of the note such that neither the note nor the trust deed embodied the agreement reached by the parties. The court allowed reformation of the instruments to conform with the true agreement of the parties and split the cost of the appeal between them. The real estate agent's error in drafting the note and trust deed, in which he was technically practicing law, was corrected at the expense of his clients.

This is the gap which attorneys have been trying to close. As shown by the overwhelming Arizona defeat their lack of success has been due substantially to the power of the real estate associations. In a discussion of the Arizona case one author suggests, in the light of the lack of success in Arizona and other states, that the state bar associations and the American Bar Association reevaluate their tactics in the campaign against the unauthorized practice of law by real estate brokers.[27] This suggestion is a valid one. Because the real estate associations command so much power

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[23] 6 Wis. 2d 149, 93 N.W.2d 854 (1959).

[24] *Id.* at —, 93 N.W.2d at 856.

[25] *Id* at —, 93 N.W.2d at 856.

[26] 69 Cal. App. 2d 151, 158 P.2d 570 (1945).

[27] Riggs, *Unauthorized Practice and the Public Interest: Arizona's Recent Constitutional Amendment*, 37 So. CAL. L. REV. 1, 20 (1964).

an alternative approach to the problem, which will avoid the head-on confrontation that has produced such dismal results, seems advisable.

The proposed alternative approach is an addition to the existing body of law. Real estate brokers should be required to exercise the particular skill to be reasonably expected of them in all acts except those which would ordinarily be classified as the practice of law. Regarding these latter acts a real estate broker should be required to exercise such skill, care and diligence as the men of the legal profession commonly possess and exercise in such matters. This addition would close the gap and give the injured client in *Breeden* and *Engebrecht* a cause of action against a real estate broker when he incorrectly advises a client on the legal effect of a legal instrument or improperly drafts a deed, mortgage, trust deed, or any other instrument the drafting of which is considered the practice of law. If a real estate broker insists upon practicing a limited amount of law he should be held to a higher standard of care than that of other salesmen.[28]

Implicit in such an addition to the law is the need for a clearer definition of what acts constitute the practice of law. This must be done in order to give the broker notice of when he is going to be held to the higher standard of care. Cases like *Breeden, Engebrecht,* or *Arkansas* will undoubtedly provide a useful framework but much room for judicial interpretation must be left. As the court said in the *Arkansas* case, " . . . it is impossible to frame any comprehensive definition of what constitutes the practice of law. Each case must be decided upon its own particular facts."[29]

The proposed addition to the law will not work a hardship on real estate brokers. Their right to be paid a commission accrues when the deposit receipt has been signed by the buyer and seller.[30] It is not incumbent upon them to go ahead and draft a deed, mortgage, or trust deed. Brokers do draft these instruments not to secure a commission but because it is incidental to the transaction, convenient for all parties including the broker, reduces the cost of the transaction by avoiding attorney's fees, or expedites the sale. However, he is not *required* to "practice law," *e.g.* drafting the instruments incidental to closing a transaction; rather he does so pursuant to an established and dangerous custom.[31] The tradi-

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[28] *Id.* at 11-13.

[29] Arkansas Bar Ass'n v. Block, — Ark. —, 323 S.W.2d 912, 914 (1959), *cert. denied,* 361 U.S. 836 (1959).

[30] Green v. Linn, 210 Cal. App. 2d 762, 26 Cal. Rptr. 889 (1962).

[31] Comment, *Attorney and Client: What Constitutes the Practice of Law,* 29 CALIF. L. REV. 603, 607 (1941).

tional requirements, *i.e.* that the instrument be relatively simple, no fee be charged for the drafting, and that the drafting be incidental to another transaction, have not been enlarged or diminished by the proposal. Nor is the broker to be held to the attorney's disciplinary proceedings, ethics, or confidential relationships with clients. He simply should be held to use the same precision and skill as an attorney when he does practice law to the extent presently allowed by custom and practice.

Two practical effects will follow the adoption of the higher standard of care. First and most important, the higher standard of care will give a client injured by a broker's improper "practice of law" a civil action against that broker. Second, the higher standard of care will help to insure that brokers do not expand their limited practice of law beyond that which custom has allotted to them. Naturally, a broker will be less anxious to draft legal instruments incidental to his transactions, knowing he will be held to a higher standard of care and the expanded liability.

The effectiveness of such an addition is that it very adequately protects the public from faulty legal advice or services by requiring real estate brokers giving such services to conform to a standard of care commensurate with the practice of law. It requires brokers to draft legal instruments with precision, otherwise they, and not their clients, will suffer the damages. In addition, this proposal avoids the direct conflict involved in attempting to wrest from real estate brokers an accepted and established power presently in their hands. This addition to the law will not limit the powers of real estate brokers but will only require that when they "practice law," they be held to the skill and care normally attributed to attorneys.

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